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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHANDLER EMILE GRAHAM,

Defendant and Appellant.

G056855

(Super. Ct. No. 15HF1090)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed in part and remanded with directions.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Following a jury trial, defendant Chandler Emile Graham was convicted of four counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c));¹ assault with a firearm (§ 245, subd. (a)(2)); evading while driving recklessly (Veh. Code, § 2800.2); unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)); and possession of a firearm by a felon (§ 29800, subd. (a)(1)). As to the four robbery counts, the jury found defendant personally used a firearm (§ 12022.53). The court found true sentencing enhancement allegations that defendant had previously suffered a prior strike, within the meaning of the “Three Strikes” law (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). Defendant was sentenced to 44 years 4 months in prison, which included a five-year prior serious felony enhancement (§§ 667, subd. (a)(1), 1192.7).

This is defendant’s second appeal from the judgment. In his first appeal, we held he was entitled to a sentencing hearing to permit the court to exercise its discretion and determine whether to strike the firearm enhancements under then recently enacted legislation (§ 12022.53, subd. (h)), and we remanded the matter for a new sentencing hearing. (*People v. Graham* (May, 23, 2018, G055219) [nonpub. opn.].) On remand, the court decided not to strike the firearm enhancements.

Defendant now appeals from the resentencing hearing and argues the matter must be remanded again, this time to allow the court to exercise its discretion as to whether to strike the imposed five-year prior serious felony enhancement, based on legislation enacted since his first remand hearing. Subsequent to the remand hearing, the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.), which effective January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b), to provide a court discretion to strike or dismiss a five-year prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28

¹ All further statutory references are to the Penal Code unless otherwise stated.

Cal.App.5th 961, 971.) We agree with the parties that this new legislation applies retroactively to defendant as his judgment was not final at the time the new legislation took effect. We remand the matter a second time to permit the court to exercise its newly conferred sentencing discretion.

Because the sole issue argued on appeal is whether the matter should be remanded to permit the court to exercise its discretion concerning the prior serious felony enhancement, we only briefly summarize the facts. Defendant, a convicted felon, robbed a credit union while armed with a gun. During the robbery, he hit a customer and pointed a gun at four bank tellers while demanding money from them. After fleeing the bank, he led police on a high-speed chase in a stolen vehicle, until he crashed the car and surrendered. Defendant was previously convicted of murder, a serious felony within the meaning of section 667, subdivision (a).

At the time of defendant's sentencing and remand hearing, the court was required to impose the five-year prior serious felony conviction enhancement under section 667, subdivision (a). However, after defendant's resentencing hearing, sections 667, subdivision (a) and 1385, subdivision (b), were amended effective January 1, 2019, to provide a court discretion to strike or dismiss a five-year prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 971.)

Defendant and the Attorney General agree the amended statutes apply retroactively to defendant under the principles espoused in *In re Estrada* (1965) 63 Cal.2d 740. We concur, as do the other divisions of this appellate district. (*People v. Garcia, supra*, 28 Cal.App.5th at pp. 971-973 [Division Two holding Senate Bill No. 1393 applies retroactively to cases not final before the bill’s effective date]; *People v. Pride* (2019) 31 Cal.App.5th 133, 142 [Division One finding the amendments apply retroactively and remanding for the court to exercise its “newly conferred discretion”].)

The Attorney General, however, urges us not to remand defendant’s case to allow the court to consider whether to strike the five-year prior serious felony enhancement, arguing remand would be futile. The Attorney General relies on the court’s comments at the sentencing and remand hearings. Specifically, the Attorney General cites the court’s statements at sentencing that it found numerous factors in aggravation and none in mitigation and the court’s comments concerning defendant’s knowingly dangerous behavior of evading while driving recklessly. In arguing remand is unwarranted, the Attorney General also points out the court declined to exercise its discretion to strike the firearm enhancements when given an opportunity to do so.

Where, as here, “the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) “Defendants are entitled to ‘sentencing decisions made in the exercise of the “informed discretion” of the sentencing court,’ and a court that is unaware of its discretionary authority cannot exercise its informed discretion.” (*Ibid*; accord, *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Where a trial court was unaware of its sentencing discretion, remand is necessary because trial courts are best suited to exercise sentencing discretion, and it is “not [a] legitimate function[] of the Court of Appeal” to substitute its discretion for that of the trial court. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 897.)

Thus, “unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion,’” the appropriate remedy is to remand for resentencing. (*Gutierrez*, at p. 1391; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [“remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement”].)

Despite the court’s previous comments and decisions, we cannot conclude categorically that the court would not exercise its discretion to strike the prior serious felony enhancement, as the court did not have this choice previously. At the time of the initial sentencing, the court recognized it did not have discretion to strike the five-year prior serious felony enhancement and had to impose it. Nor did the court have the power to dismiss or strike this enhancement at the remand hearing. Although the court did not strike the firearm enhancements at the remand hearing, the sentencing impact of striking the five-year prior serious felony enhancement is much less than striking the gun use enhancements which had added 20 years to defendant’s sentence. The court’s statements at the sentencing and remand hearings do not include any remarks indicating whether or not it would strike the five-year prior felony enhancement if it had the ability to do so. The court has never analyzed whether striking this enhancement is in the furtherance of justice, and the court should have the opportunity to exercise its discretion in the first instance. Accordingly, we remand the matter.

DISPOSITION

The matter is remanded for the limited purpose of allowing the court to consider whether to dismiss the five-year prior serious felony enhancement in the furtherance of justice. If the court exercises its discretion to do so, it shall resentence defendant accordingly. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

GOETHALS, J.